Supreme Court, U.S.
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No

In the Supreme Court of the United States

ESTATE OF CHRISTOPHER A. MORELAND, Deceased by GARY R. MORELAND and LINDA TUTTLE, Co-Personal Representatives, GARY R. MORELAND, in his official and individual capacity, LINDA TUTTLE, in her official and individual capacity, et al.,
Petitioners,

v.

JOSEPH SPEYBROECK, in his individual and official capacities, Sheriff of St. Joseph County,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

GEOFFREY NELS FIEGER
VICTOR S. VALENTI
Counsel of Record
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.
19390 WEST TEN MILE ROAD
SOUTHFIELD, MI 48075-2463
(248) 355-5555
(248) 355-5148 FAX

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED FOR REVIEW

Is a County Sheriff subject to 42 U.S.C. § 1983 liability as the official policymaker where the actual practice toward detainees at his jail with respect to medical care and discipline was so constitutionally defective under the Fourteenth Amendment that a jury could find a direct causal link between the plainly obvious need for better and different training, the jailers' disregard or ignorance of the written policies, and a detainee's torture death at the jail?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here, are disclosed in the caption of the case. Petitioners are individuals, the parents of Christopher Moreland, deceased.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the order rendered in this case by the United States District Court for the Northern District of Indiana, Hammond Division and affirmed by the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The January 14, 2005 panel opinion for the Seventh Circuit is reported at 395 F.3d 747 (7th Cir. 2005) and is reprinted at App. 1a-32a. The March 20, 2002 order of the United States District Court for the Northern District of Indiana, Hammond Division is unreported, but is printed at App. 25a-32a. The April 2, 2002 order denying clarification and reconsideration is unreported but is printed at App. 23a-24a.

STATEMENT OF JURISDICTION

The Seventh Circuit issued its opinion on January 14, 2005. This petition for certiorari is timely in that Petitioners have filed it within 90 days of January 14, 2005. The Court has jurisdiction pursuant to 28 U.S.C.§1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners rely upon 42 U.S.C. §1983 which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Petitioners also rely upon the Fourteenth Amendment of the Constitution of the United States, Section 1 of which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

I. Overview

This is an action under 42 U.S.C. §1983 for deprivation of civil rights arising out of the beating death of pretrial detainee Christopher Moreland in the St. Joseph County, Indiana jail. The Seventh Circuit affirmed a substantial, but uncollectible, jury verdict against two former St. Joseph County sheriff's deputies, Erich Dieter and Michael Sawdon, but also affirmed on Petitioner's cross-appeal of the district court's order granting summary judgment to Respondent Joseph Speybroeck, the Sheriff of St. Joseph County, on the official capacity claim based on policy or custom. Petitioners ask this Court to grant certiorari to review the summary judgment dismissal of Sheriff Speybroeck or alternatively to summarily reverse the summary judgment and remand to the

United States District Court for the Northern District of Indiana for trial.

In the early morning hours of October 25, 1997, thirty year old Christopher Moreland was arrested by officers of the Mishawaka Police Department for driving under the influence of alcohol. Moreland behaved erratically during his arrest - - for example, by hitting himself in the face - - but the police officers testified that Moreland's behavior was not unusual for someone who was drunk and upset. He was held for about two hours at the Mishawaka Police Department and then transferred to the St. Joseph County Jail. Although obviously inebriated, Moreland entered the jail under his own power, and at approximately 5:50 a.m. was placed in the "drunk tank" along with three other detainees.

Moreland pounded or kicked the drunk tank door calling for a blanket. He directed a racial slur at a black man, Donald Coleman, who had a blanket. By the time shift supervisor Sergeant Paul Moffa responded to the disturbance and entered the drunk tank with Deputy Holvoet, Moreland was sitting, passive and non-threatening. When Moreland again requested a blanket, Moffa reached forward with his hands on either side of Moreland's neck, threw Moreland forcefully to the concrete floor, removed a canister of OC-10 spray from his waist and sprayed Moreland's face.

As Coleman covered up with the blanket to avoid the pepper spray, he heard a loud thump "like the sound of a basketball bouncing off concrete." Another detainee in the drunk tank said it sounded like "a melon popping, like dropping a watermelon." Both detainees surmised that this was the sound of Moreland's head hitting the concrete.

Moffa and Holvoet cuffed Moreland behind his back and dragged him out of the drunk tank to a nearby elevator. Holvoet and another officer, Shawn Albright, accompanied Moreland to the fourth floor to wash off the pepper spray. Moffa, who had been hit by pepper spray ricocheting off Moreland's face, stayed behind to wash the pepper spray from himself.

Erich Dieter and Sergeant Moffa were pals, and when Holvoet and Albright got off the elevator at the fourth floor with Moreland, Holvoet told Dieter that "this is the guy that got Moffa sprayed." Albright took this as a hint to Dieter that Moreland "needs a little bit of payback." Albright saw Dieter immediately lift Moreland into a standing position and quickly walk him, still cuffed, into the shower where Albright heard a thump as Dieter ran Moreland into the back wall.

Dieter or another officer turned on the hot water, which exacerbates the pain of pepper spray. In response to Moreland's cries from inside the shower (the defendants maintained he was belligerent, but other officers and witnesses testified that he was crying out for help), Sawdon said to the other officers, "Hey, guys, do you want to see something funny?" He then threw a five-gallon bucket of cold water over Moreland. Other officers gathered outside the shower, watching and laughing as Moreland, still handcuffed, lay with his head in a shallow puddle of water, spit, and mucus, trying to wash the pepper spray off his face.

Dieter and Sawdon then dragged Moreland from the shower and strapped him into a "restraint chair." Designed to control an aggressive inmate who may endanger an officer or another inmate, the "Pro-Straint Restraining Chair" enables officers to shackle and tie down an inmate while keeping him in a seated, upright position. Moreland remained

handcuffed while in the restraint chair. According to several inmates who observed what happened from inside their cells, Moreland sat in the restraint chair for several minutes, cursing and yelling at the defendants and asking them why they were doing this to him.

According to the inmates, Sawdon kept telling Moreland to shut up. Then Sawdon went into the guard tower at the center of the floor and came out with an OC-10 canister. He approached Moreland and discharged the canister in his face while he was still strapped in the chair. Officers who arrived on the fourth floor shortly thereafter noticed the unmistakable residual odor of an OC-10 blast. Some witnesses also reported hearing the sounds of Moreland being beaten during this time.

Dieter and Sawdon then removed Moreland from the restraint chair and forcibly put him back into the shower again. Some time later they put Moreland back in the restraint chair and moved him into a nearby "attorney's room," out of view of the other inmates. About 6:30 a.m. Albright and another deputy, Tracy Derda, returned to the fourth floor with a spit mask requested by Moffa, who had been called upstairs by Dieter. Moreland was in the restraint chair, not moving, still cuffed from behind, slouched back in the chair with his head cocked to the right and his eyes closed.

Connie Spicer, the jail's medication aide who had no assessment authority, was also there. Moreland's face was still orange-red from dye in the pepper spray. He was soaking wet, his head was leaning back, eyes closed, he was moaning and not responsive to questions. Spicer told Dieter and Moffa that Moreland needed to go to the hospital, but she said Moffa, Dieter and Sawdon did not want him sent there.

Spicer did not know that she could order Moreland be taken to the hospital.

Moffa denied that he did not want Moreland taken to the hospital because he was covering up and hoping Moreland would survive at the jail. Instead, he claimed he wanted the day shift to take Moreland to the hospital because the shift was changing, and he did not want to pay overtime. Even though Deputies Derda and Albright agreed that someone on the fourth floor "beat his ass," neither reported the abuse because the "unwritten code" prohibited them from reporting fellow officers.

Two day shift officers, Wilson and Johnson, found Moreland unconscious in the attorney's room shortly after 7 a.m. They noticed a large lump on the back of his head, injuries to the front of his face, and a bandage over the cut above the his left eye. Wilson took Moreland, still unconscious, to the first floor, changed his clothing, and placed him back in the drunk tank.

Spicer saw Moreland in the tank around 9:40 a.m., coughing and unresponsive. At 11:00 a.m., when she checked on him again, Moreland had not moved. The next time she checked Moreland was blue, cold, and lifeless. Moreland was pronounced dead at approximately 1:23 p.m. The coroner and other forensic experts testified that the cause of Moreland's death was an acute subdural hematoma that could only have occurred during the period of time Moreland was at the St. Joseph County Jail.

The complaint alleged that Sheriff Speybroeck, in his official capacity, as a custom, practice or policy, was deliberately indifferent to the jail staff's use of excessive force and to the need to better train employees to respond to

detainees' serious medical needs. Discovery established that, at the time of Moreland's death, the jail was in violation of a federal consent decree requiring Speybroeck to keep the inmate population at or below 300, or 350 on weekends. At the time of Moreland's death, the Jail housed 360 inmates. The Jail was also short two deputies that day.

Petitioners' expert George Kirkham stated by affidavit that the jailers "violated widely accepted standards and practices regarding supervision and control of jail inmates" by twice spraying Moreland with pepper spray (once while restrained in the restraint chair), despite the fact that Moreland at no time posed a physical threat to any officer or inmate in the Jail. Kirkham said that, "No reasonable prudent, well-trained officer would have believed that the degree of force used against Christopher Moreland was lawful or in any way justifiable." Kirkham further opined that "The use of OC 10 spray, the lack of attention to policy regarding the use of OC 10 spray and the custom and practice of using OC 10 spray for verbal altercations reflect deliberate indifference on the part of the Sheriff as well as a custom and practice regarding the inappropriate use." As to medical treatment, Kirkham said:

> There was a lack of training regarding the appropriate steps to be taken in a medical emergency. This lack of training was evidenced by the fact that despite the awareness that all personnel understood that Mr. Moreland needed emergency medical attention, no one understood the steps that needed to be taken to obtain this treatment. This lack of training indicates a custom and practice of the County of deliberate indifference to medical needs.

Petitioners' other jail procedures expert Ken Katsaris stated that Jail "administration should have been aware of the custom and practice of the use of OC that the officers were using to guide them as to when to use OC spray that differed from the written policy and established practice." He also stated that "There is no credible evidence of any training on the use of the restraint chair," even though there was a policy. As to medical care, Mr. Katsaris said:

> The indifference to Moreland's medical needs, even after he was discovered to have two separate head injuries, one occurring and evaluated at approximately 6:45 a.m. and the other discovered at 9:45 a.m. was due to a lack of policy training as to who has authority to send a prisoner to the hospital for medical care. Nurse Gachunja [Spicer] believe she needed to call and get authority from her supervisor, when in fact by their own policy any correctional officer could have called an ambulance and evaluated Moreland if he was found to be injured.

II. The District Court Opinion

On March 20, 2002, just three business days after receiving Moreland's brief in opposition to summary judgment that provided substantial evidence of Speybroeck's official deliberate indifference to serious medical needs, lack of training and supervision at the jail as supported more than 300 pages of depositions, affidavits and other documentary evidence, the district court dismissed the Sheriff. The judge dismissed even though Speybroeck's brief and exhibits never addressed the denial of medical care claim pled in the complaint. The crux of the opinion holding that Speybroeck was not deliberately indifferent consisted of a Sphinx-like thirty-four lines that are devoid of any factual analysis or of

any statement of the judge's reasons for finding no genuine issue of material fact.

III. The Court Of Appeals Opinion

On appeal, Moreland again asserted that from the evidence presented, a jury could find that Speybroeck had constructive notice that despite their training, jail deputies frequently misused the restraint chair and were deliberately indifferent to detainees' serious medical needs. Nonetheless, the Seventh Circuit said that "the evidence is insufficient to raise a jury question on plaintiffs' claim against the sheriff." The panel stated that the incidents of improper use of OC-10 spray "do not amount to 'a widespread practice' that is 'permanent and well-settled' so as to constitute an unconstitutional custom or policy about which the sheriff was deliberately indifferent."

Then, in response to the argument that jail personnel were inadequately trained to recognize the signs of serious head injury and otherwise respond to a medical emergency, the Court said "[t]here is no evidence that the policies, customs, or practices of the department were deficient" because, citing its decision in *Woodward v. Correctional Medical Services of Illinois*, 368 F.3d 917 (7th Cir 2004), one cannot infer a custom or practice from a single incident."

REASON FOR GRANTING THE PETITION

The issue of 42 U.S.C. official liability has little practical significance in those cases where the governmental unit indemnifies employees for compensatory damages awards for constitutional torts they commit in the course of their employment. *See Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988). But when, as here, the applicable Indiana indemnification statutes make the collection of any meaningful

compensatory damages against the individual jailers doubtful, one major reason to submit the official liability claim is to find a source to satisfy the jury's award to Christopher Moreland's Estate.

Moreover, the official liability claim against Sheriff Speybroeck is critical because it raises significant public issues regarding the enforcement of the statutory will of Congress. It also facilitates the development of systemic evidence of deliberate indifference to police brutality. By discovering the attitudes of police and jail officials toward important disciplinary issues, the future course of police and jail practices are positively influenced. This case directly conflicts with this Court's well established proposition that where the risk is clearly very great and the need for better and different training and supervision is plainly obvious, even a single violation of federal civil rights is sufficient to trigger official liability. *Harris v. City of Canton*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Board of County Comm'rs v. Brown*, 520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). The Court of Appeals decision in this case loses sight of these principles.

Further, Supreme Court Rule 10 identifies considerations employed by the Court in deciding whether to exercise its discretion to grant certiorari. One of these considerations is whether the Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. That consideration is present here. The decisions below represent a gross miscarriage of justice that warrants the Court's review. Even if the Court concludes that the issue raised by the Petition is

not certworthy, the Court should summarily reverse and remand for trial on Sheriff Speybroeck's official liability.

I. Sheriff Speybroeck Is Subject To Official Liability Where The Actual Practice Toward Detainees With Respect To Medical Care And Jail Discipline Was So Constitutionally Inadequate Under The Fourteenth Amendment That There Was A Direct Causal Link Between The Plainly Obvious Need For Better And Different Training, The Jailers' Disregard Of The Written Policies And Mr. Moreland's Torture Death.

A. The Applicable Law

To establish a claim against Sheriff Speybroeck in his official capacity, Petitioners must establish that Moreland's rights were violated as a result of a custom or policy of the Sheriff's Department. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). An unconstitutional custom or policy can take three forms:

> (1) an express policy that, when enforced, causes a constitutional deprivation, *see, e.g.*, *Monell*, 436 U.S. at 690; (2) "a widespread practice that, although not authorized by written law or express municipal policy, is so 'permanent and well settled as to constitute a custom or usage' with the force of law,'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); or (3) an allegation that the constitutional injury was caused by a person with "final policymaking authority." *Praprotnik*, 485 U.S. at 123; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Here, despite the existence of policies, the clear custom and practice at the jail was not to follow them. Speybroeck knew that the Jail was overcrowded, that the staffing was inadequate and that the shortage of staff in the overcrowded jail created an environment certain to lead to the use of excessive force. The evidence establishes a shocking failure to train and monitor deputies' use of OC-10 to control inmates and a shocking failure to train deputies and medical staff on when, how and who had authority to send inmates to the hospital for medical treatment.

In *Harris v. City of Canton*, 489 U.S. 378, 1095 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Supreme Court stated:

> "But it may happen in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." 489 U.S. at 390.

In *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), the Supreme Court, discussing *Harris* in the context of the state of mind requirement of a governmental entity, explained that the inquiry focuses on liability based on obviousness or constructive notice. Thus, the inference of requisite knowledge to establish deliberate indifference can be drawn from circumstantial evidence. In *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), the Supreme Court held that evidence of a single violation of federal rights can trigger

municipal liability if the violation was a "highly predictable consequence" of the municipality's failure to act.

On remand, the Fifth Circuit held that a single decision of the sheriff not to train a reserve deputy before putting him on the street to make arrests constituted an actionable policy for which the county could be liable. *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000) *cert. den.* 532 U.S. 1007, 121 S.Ct. 1734, 149 L.Ed.2d 658 (2001). The Court relied in part on footnote 10 in *Harris*, where, as the Fifth Circuit put it, the Supreme Court indicated that because it was a "moral certainty that police officers are required to arrest fleeing felons . . . when the city arms its officers to carry out this task, there is thus an obvious need to train officers in the constitutional limitations of the use of deadly force. This need for training is so obvious that the failure to train is deliberate indifference to constitutional rights." 219 F.3d at 459.

The Fifth Circuit said the jury in *Brown* could have found that what the reserve deputy did to the plaintiff was the plainly obvious consequence of the sheriff's failure to train and supervise him. *See also*: *Allen v. Muskogee, Okla.*, 119 F.3d 837, 842 (10th Cir. 1997) ["evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability."]; *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1171-1173 (11th Cir. 1995) [based on affidavits, it was possible that the need for more and better training was obvious and hence city should not be given summary judgment]; *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207 (11th Cir. 1993) [sufficient evidence of inadequate training and supervision, as well as deliberate indifference including inadequate procedures for

recording and following up on complaints against officers and lack of police report in plaintiff's arrest]; *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991) [inadequate training and policies concerning correct and accurate identification of suspects and ensuring that suspects are accounted for while incarcerated].

This egregious case fits separately within *Harris* and its progeny. A jury could find that Speybroeck was deliberately indifferent in allowing unwritten customs and practices to flourish, and that he breached his duty to train his jail deputies to recognize and effectively handle emergency medical conditions.

B. The Court Of Appeals Affirmance Conflicts With *Harris*, *Farmer* And *Brown* Because Petitioners Presented Facts From Which A Jury Could Find That Speybroeck Had Constructive Notice Of The Jail's Unconstitutional Practices, But Was Nonetheless Deliberately Indifferent To Detainees' Serious Medical Needs, To The Serious Deficiencies Between Training And Actual Practice In The Use Of The Restraint Chair And Pepper Spray, To The Jailers' Code Of Silence, And To The Overcrowded Conditions.

In affirming the summary judgment, the Court of Appeals ignored the holdings of *Harris*, *Farmer* and *Brown*. This is best demonstrated by the Seventh Circuit panel's strained effort to distinguish its own recent decision in *Woodward v. Correctional Medical Services of Illinois*, 368 F.3d 917 (7th Cir. 2004). In fact, *Woodward* correctly applied the Supreme Court precedents and is virtually "on all fours" with the instant factual scenario.

In *Woodward*, the Court affirmed the jury's § 1983 verdict against Correctional Medical Services ["CMS"], a private contractor, for its staff's violations of written policies and procedures such that CMS "tolerated if not encouraged the custom or practice that encompassed deliberate indifference to the substantial danger posed" to suicidal inmates. 368 F.3d 920. Plaintiff's expert attributed decedent's suicide to a "system failure" resulting from CMS's practice of ignoring its own policies and procedures. Although the expert had no quarrel with the specific procedures, the fact was CMS systematically ignored them.

Noting that CMS was treated the same as a municipality for purposes of § 1983, the Seventh Circuit found that there was enough evidence for the jury to conclude the CMS's actual practice, as opposed to its written policy, toward persons in serious need of medical treatment was so inadequate that there was a direct causal link between the deviation from established policy and the suicide. In so ruling, the Court explicitly rejected defendants claim that "the plaintiff's failure to introduce evidence of any suicide at the Lake County jail besides Farver's dooms plaintiffs efforts to prove a custom or practice." 368 F.3d 929. Emphasizing that CMS does not get "a one free suicide" pass, the Court reminded that under *Bd of Comm'rs of Bryan City v. Brown*, *supra*, 520 U.S. at 409, evidence of a single violation of federal rights can trigger municipal liability if the violation was a "highly predictable consequence" of the municipality's failure to act. In sum, deliberate indifference was demonstrated by CMS's condoning of its employees not following policies. *Id.*

The Seventh Circuit purported to distinguish *Woodward* from this case, but the Court inconsistently stated that even though "a single violation of federal rights can trigger § 1983

under *Monell v. New York City Dep't of Soc. Servs.*, *supra*, if the violation was 'a highly predictable consequence' of the failure to act, here Plaintiffs failed to show that "an unconstitutional policy, custom or practice existed at the time the plaintiff's rights were violated." App 21a. This unconstitutional custom or practice is exactly what Plaintiffs here established by setting forth the wealth of evidence regarding the Jail's "actual practice" with respect to medical care and detainee discipline. The Seventh Circuit's circuitous reasoning places the decision in this case squarely at odds with the fundamental principles for establishing municipal liability articulated in *Harris*, *Farmer* and *Brown*.

Factually, here as to the denial of medical care, Sgt. Gruler, the first shift commander who arrived at 7 a.m. on October 27, 1997, admitted to the grand jury that he had no idea what the medical procedures were:

> "Q. (by Grand Juror) I have a question. As shift commander, were you responsible for the entire jail during your shift?
>
> A. Under the code, yes.
>
> Q. Then under your supervision, who was actually responsible for this inmate's health that day? Would it be you, the nurse, the people on the fourth floor?
>
> A. The actual medical attention would have been the medical staff. They have been told of the situation undoubtedly because the nurse has been called prior to my arrival.
>
> So, in essence, it is a medical staff situation. My officers were there also to help and assist, but also as security."

Third shift jail commander, Sgt. Paul Moffa, and Nurse Spicer, both knew Moreland needed to go to the hospital, but did absolutely nothing in response to a clear medical emergency. Both the district court and the Court of Appeals were provided with a color photograph showing the obvious wound to Moreland's left forehead area. Speybroeck's brief and exhibits below never addressed the denial of medical care claim. His affidavit and exhibits never addressed whether the individual defendants or anyone else at the Jail received any medical policy training.

Here, as in *Woodward*, whatever policy Speybroeck claimed to have had in place was ignored. As *Woodward* makes clear, "ignoring a policy is the same as having no policy in place in the first place." 368 F.3d 929. Under *Monell* and *Harris*, whether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question. The conflict with prevailing Supreme Court § 1983 municipal liability authority in this case cannot be reconciled. A jury should have been permitted to decide whether Sheriff Speybroeck was liable in his official capacity.

Jailer Tracy Zenz was also unaware of medical policy when she testified before the grand jury. Grand jury witnesses including Deputy Wilson stated he relied upon Nurse Connie Spicer, an aide licensed under Indiana law to dispense pills only, to decide if Moreland needed medical attention. But, Spicer claimed that she did not know that she could order that Moreland be taken to the hospital. Inmate trustee, Thomas King, was instructed by Deputy Otis to watch over Chris Moreland and make sure he keeps breathing, yet no nurse or deputy ever appeared from 7:00 a.m. to 9:45 a.m. There was only one written policy for emergency medical procedure to be utilized within the jail, yet no one understood

or followed its directives and it is painfully obvious that Gruler, the person Speybroeck had put in shift command of the entire jail did not know that he had the duty and authority to act on medical emergencies.

1. Restraint Chair/OC-10 Pepper Spray/Code of Silence

As Supreme Court § 1983 jurisprudence makes clear, the usual way in which an unconstitutional policy is inferred, in the absence of direct evidence, is by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned the misconduct of subordinate officers. Here, beyond the lack of medical care evidence, there was other evidence that raises an inference of official deliberate or reckless indifference from the use of pepper spray and the restraint chair for discipline and from the "code of silence" testimony.

Speybroeck's affidavit filed with his summary judgment response asserted that he delegated authority to subordinate personnel at the Jail including the Assistant Chief of Police, the Jail Warden and the Jail Administrator, for purposes of day-to-day administrative duties because, "I could not be everywhere and know everything at all times during the operation of the jail facility or the department as a whole." Speybroeck further stated that he met with jail command staff "on a daily basis to discuss issues involving the operating of the jail; however, it was impossible for me to read every report or document generated by the operation of the St. Joseph County Jail." This plea of ignorance is tantamount to admitting that Speybroeck not only turned a blind eye, but in fact was doing so to insulate himself from liability, i.e. by

never looking at the OC-10 reports, Speybroeck would never know what is happening at the Jail and there could never be any official responsibility. Speybroeck's conduct is the equivalent of throwing complaints into a wastepaper basket or telling subordinates to pay no attention to them. *See Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

A jury could conclude that Speybroeck's Exhibit H to his summary judgment brief which is a memo to detail commanders on the issue of documentation is an admission that jail deputies were not writing OC-10 reports. The exhibit corroborates Shawn Albright's code of silence statements in his grand jury testimony. Moreover, Speybroeck's expert affidavit relating to OC-10 use indicated that Speybroeck must authorize each use of the pepper spray which would amount to hundreds of incidents authorized by Speybroeck including the incident on August 23, 1997 when Dieter and Sawdon sprayed detainee Daniel Grimm in the face while he was locked in the restraint chair. The Sheriff knew full and complete reports were not being provided, yet in Mr. Grimm's case some six weeks after the "documentation memo," no action was taken per the written policy on Use of Force.

Additional evidence also included Moffa spraying detainee Casimer Wawrzynniak on June 18, 1997 when he refused to stop kicking the door of the drunk tank. Similarly, on November 16, 1996, Dieter sprayed Robert Coaron in the face while he was locked in the restraint chair. A jury could connect these incidents into a pattern of abusive use of OC-10 to which Sheriff Speybroeck turned a blind eye. Further, despite the promulgation of orders on the appropriate use of OC-10 spray, from the time Speybroeck took office on January 1, 1990 through Christopher Moreland's death, there were 217 OC-10 spray incidents, yet contrary to the

procedures, there are no instances where the spraying was videotaped, and there were no instances where photos were taken.

This evidence of ongoing violations of jail policies buttresses the claim that Speybroeck had actual or constructive notice such that he may be constitutionally culpable for the wide departure of actual Jail practice from written policy. The constitutional factfinder should have been allowed to consider this evidence that Speybroeck failed to adequately train his employers. A jury could find deliberate indifference in Speybroeck's condoning of employees not following policies. As this Court clearly recognized in *Farmer v. Brennan*, *supra* 511 U.S. at 841-843 and n.8, if the risk is obviously very great, the jury must be permitted (though it is not required) to draw an inference that despite the official's denials and absence of direct evidence of his state of mind, he knew of the risk.

II. If The Issue Raised Is Not Certworthy, The Court Should Nonetheless, In The Exercise Of Its Supervisory Power, Reverse And Remand For Trial Because The Decisions Below So Far Departed From The Accepted And Usual Course Of Judicial Proceedings That They Amount To A Miscarriage Of Justice.

The materials submitted with the summary judgment response provided substantial evidence of Speybroeck's official deliberate indifference to serious medical needs, lack of training, supervision and existence of a defacto policy directly contrary to written policy. Summary judgment was granted on the medical needs claim even though Speybroeck never addressed it. The district court's opinion granting summary judgment was a "boilerplate recitation of the Rule 56 standard but with no discussion of the evidence."

Members v. Paige, 140 F.3d 699, 701 (7th Cir. 1998). The district judge's reasons are simply not apparent from the opinion. In *Pasquino v. Prather*, 13 F.3d 1049, 1051 (7th Cir. 1994), the Court in the context of Circuit Rule 50 vacated and remanded a § 1983 qualified immunity denial for a more plenary explanation because the opinion "should leave no doubt that reasons and explanations must be given by a district judge as to what facts and law have led him to reach the ruling at bar." The Sphinx-like district court opinion likewise failed that test.

The district court's unreviewable opinion resulted in the perpetuation of this error at the Court of Appeals. The Court failed to apprehend how a jail where the staff did not understand or refused to follow the appropriate steps to be taken in a medical emergency, routinely misused OC-10 spray, misused the restraint chair, failed to file OC-10 incident reports and engaged in a code of silence pattern of inaction could establish an unconstitutional policy, custom, or practice on the part of the official policymaker. The decisions below dismissing Speybroeck represent a gross miscarriage of justice that warrants at least a summary reversal.

At the summary judgment hearing and at the Court of Appeals, Petitioners presented specific facts establishing a policy or practice of official acquiescence in the constitutional torts committed at the St. Joseph County Jail from which a jury could conclude that Sheriff Speybroeck engaged in a custom or policy of failing to train or supervise jail personnel. To properly effectuate the Congressional purpose of 42 U.S.C. § 1983 it is essential that there be a public trial examining official liability for civil rights violations in egregious cases like the October 25, 1997 torture death of Christopher Moreland in the St. Joseph County, Indiana jail.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, the Court should summarily reverse the summary judgment and remand to the United States District Court for the Northern District of Indiana for trial.

Respectfully Submitted,

Geoffrey Nels Fieger
Counsel of Record
Victor S. Valenti
Fieger, Fieger, Kenney & Johnson, P.C.
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555
(248) 355-5148 Fax

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 03-3734 & 03-3735

[Filed January 14, 2005]

ESTATE OF CHRISTOPHER A. MORELAND, Deceased by GARY R. MORELAND and LINDA TUTTLE, Co-Personal Representatives, GARY R. MORELAND, in his official and individual capacity, LINDA TUTTLE, in her official and individual capacity, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

ERICH DIETER and MICHAEL SAWDON,
Defendants-Appellants,

and

JOSEPH SPEYBROECK, in his individual and official capacities, Sheriff of St. Joseph County,
Defendant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 99 C 607
Allen Sharp, Judge

Before ROVNER, WOOD and SYKES, Circuit Judges.

OPINION

SYKES, Circuit Judge.

This is an action under 42 U.S.C. § 1983 for deprivation of civil rights arising out of the death of an inmate in the St. Joseph County, Indiana jail. Defendants Erich Dieter and Michael Sawdon, former St. Joseph County sheriff's deputies, were found liable for violating Christopher Moreland's civil rights by wrongfully causing his death by the use of unnecessary and excessive force. The jury awarded substantial damages: $29 million in compensatory damages and $27.5 million in punitive damages ($15 million against Dieter and $12.5 million against Sawdon). On appeal Dieter and Sawdon assert evidentiary and instructional errors and also challenge the punitive damages as unconstitutionally excessive. The plaintiffs cross-appeal the district court's order granting summary judgment to Joseph Speybroeck, the sheriff of St. Joseph County. They contend the evidence was sufficient to raise a jury issue about official policy or custom in the jail for purposes of § 1983 liability against the sheriff. We affirm the judgment against Dieter and Sawdon as well as the summary judgment in favor of Sheriff Speybroeck.

I. Background

In the early morning hours of October 25, 1997, thirty-year-old Christopher Moreland was arrested by officers of the

Mishiwaka Police Department for driving under the influence of alcohol. Moreland behaved erratically during his arrest--for example, by hitting himself in the face--but the police officers testified that Moreland's behavior was not unusual for someone drunk and upset. Moreland was held for about two hours at the Mishiwaka Police Department and then transferred to the St. Joseph County Jail. Although obviously inebriated, Moreland entered the jail on his own power and at approximately 5:50 a.m. was placed in the "drunk tank" along with two other detainees.

Almost as soon as he was in the drunk tank, Moreland provoked a confrontation by directing racial slurs at Reginald Coleman, one of the other detainees in the tank. Sergeant Paul Moffa, the shift supervisor on duty that night, responded to the disturbance and entered the tank with another officer. Moffa grabbed Moreland by the neck or shoulders, threw him to the floor, removed a canister of OC-10 pepper spray[1] from his waist, and sprayed Moreland's face from a distance of roughly four or five inches. Coleman took cover underneath a blanket as pepper spray filled the air, but he heard a struggle between Moreland and Moffa and at one point heard what he said was "the sound of a basketball bouncing off concrete." The other inmate in the drunk tank said it sounded like "a melon popping, like dropping a watermelon." They surmised this was the sound of Moreland's head hitting the concrete floor.

The officers handcuffed Moreland behind his back and dragged him out of the drunk tank to a nearby elevator. They

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[1] OC-10 is a 10-percent solution of oleoresin capsicum. It causes involuntary closure of the eyes, respiratory inflammation, and temporary loss of muscular strength and coordination.

set him down on the floor in front of the elevator and prepared to take him to the shower on the fourth floor to wash off the pepper spray. Two other officers, Albright and Holvoet, accompanied Moreland in the elevator to the fourth floor. Moffa, who had been hit by pepper spray ricocheting off Moreland, stayed behind on the first floor. Moreland thrashed about as he was taken upstairs; Albright and Holvoet tried to restrain him by pinning him to the elevator floor.

When the elevator doors opened at the fourth floor cell block, Dieter was waiting to meet them. Holvoet told Dieter that Moreland was the guy "who got Moffa sprayed." Albright testified that he thought this comment was a signal from Moffa to Dieter, his close friend, that Moreland had some "payback" coming. Sawdon arrived on the fourth floor shortly after Moreland and the others.

Dieter lifted Moreland up and hauled him over to the shower. Witnesses testified that Dieter pushed Moreland into the shower with such force that Moreland hit his head against the far wall. Albright testified that Dieter held Moreland from behind and accelerated toward the shower until the two men smashed into the far wall, crushing Moreland between the wall and Dieter's own body. Dieter or another officer turned on the hot water, which exacerbates the pain of pepper spray. In response to Moreland's cries from inside the shower (the defendants maintained he was belligerent, but other officers and witnesses testified that he was crying out for help), Sawdon said to the other officers, "Hey, guys, do you want to see something funny? "He then threw a five-gallon bucket of cold water over Moreland. Other officers gathered outside the shower, watching and laughing as Moreland, still handcuffed, lay with his head in a shallow puddle of water, spit, and mucus, trying to wash the pepper spray off his face.

Dieter and Sawdon then dragged Moreland from the shower and strapped him into a "restraint chair." Designed to control or impair an aggressive inmate who may endanger an officer or another inmate, the "Pro-Straint Restraining Chair" enables officers to shackle and tie down an inmate while keeping him in a seated, upright position. Moreland remained handcuffed while in the restraint chair. According to several inmates who observed what happened from inside their cells, Moreland sat in the restraint chair for several minutes, cursing and yelling at the defendants and asking them why they were doing this to him. According to the inmates, Sawdon kept telling Moreland to shut up. Then Sawdon went into the guard tower at the center of the floor and came out with an OC-10 canister. He approached Moreland and discharged the canister in his face while he was still strapped in the chair. Officers who arrived on the fourth floor shortly thereafter reported noticing the unmistakable residual odor of an OC-10 blast. Some witnesses also reported hearing the sounds of Moreland being beaten during this time.

Dieter and Sawdon then removed Moreland from the restraint chair and forcibly put him back into the shower again. Some time later the defendants put Moreland back in the restraint chair and moved him into a nearby "attorney's room," out of view of the other inmates. Connie Spicer, the jail's medication aide, arrived on the fourth floor around this time and examined Moreland, whom she described as slouched back in the restraint chair, moaning, and unresponsive. She saw that Moreland had a cut above his left eyebrow that had bled profusely. Dieter and Sawdon told her that Moreland had slipped and fallen. She placed a bandage over the cut. Spicer told the officers that Moreland should be taken to the hospital; however, she testified that Moffa, Dieter, and Sawdon did not want to do this because their shift

was ending and transferring Moreland to the hospital would require them to remain at work. Spicer believed (incorrectly, it seems) that she did not have the authority to order the officers to transport Moreland to the hospital. Moreland remained in the restraint chair in the attorney's room, and at 7 a.m. the night shift personnel, including the defendants, left the jail.

Two day shift officers, Wilson and Johnson, found Moreland unconscious in the attorney's room shortly after 7 a.m. They noticed a large lump on the back of his head, injuries to the front of his face, and a bandage over the cut above his left eye. Wilson took Moreland, still unconscious, to the first floor, changed his clothing, and placed him back in the drunk tank. Spicer saw Moreland in the tank around 9:40 a.m., coughing and unresponsive. At 11:00 a.m., when she checked on him again, Moreland had not moved. The next time she checked Moreland was blue, cold, and lifeless. Moreland was pronounced dead at approximately 1:23 p.m. The coroner and other forensic experts testified that the cause of Moreland's death was an acute subdural hematoma that could only have occurred during the period of time Moreland was confined in the St. Joseph County Jail.

Moreland's estate and parents sued numerous parties, most of whom either settled or were voluntarily dismissed. Sheriff Speybroeck was sued in his official and individual capacities; the district court granted his motion for summary judgment. A trial was held on the claims against Moffa, Dieter, and Sawdon. The jury found Dieter and Sawdon liable, but could not reach agreement on Moffa and a mistrial was declared as to him. The jury returned damages verdicts as follows: $29 million in compensatory damages; $15 million in punitive damages against Dieter and $12.5 million against Sawdon. The case against Moffa was retried, resulting in a

verdict in his favor. Dieter and Sawdon appealed the judgment against them, and the plaintiffs cross-appealed the grant of summary judgment to Speybroeck.

II. Analysis

A. Admission of Videotaped Interviews of Defendants

St. Joseph County initiated an investigation of Moreland's death, and the defendants were interviewed several times by investigators from the Special Crimes Unit. The interviews were videotaped, and the tapes were used in a federal civil rights prosecution against the defendants, who were acquitted. The defendants objected to the plaintiffs' use of the videotapes on hearsay grounds and pursuant to Rule 403 of the Federal Rules of Evidence. The district court allowed portions of the videotapes to be played for the jury, with occasional pauses for live witness testimony. The defendants argue on appeal that the videotapes were unfairly prejudicial and should have been excluded under Rule 403, especially because the district court refused to admit evidence of the acquittals. They also appear to suggest that the district court's limiting instruction was inadequate.

We review the district court's decision to admit or exclude evidence for abuse of discretion, and the same standard applies to our review of the district court's limiting instruction. *United States v. Fawley*, 137 F.3d 458, 464 (7th Cir. 1998). "Because the trial court is in the best position to make decisions regarding jury guidance and evidentiary matters, the appellate court must give special deference to the rulings of the trial court." *Id.* The defendants argued in the district court that the videotaped interviews should be excluded because the interrogators' questions to Dieter and Sawdon--some of which incorporated information gathered by

investigators looking into Moreland's death--were hearsay. They now concede that the interrogators' questions were not hearsay because they were offered to provide context for the defendants' statements in the interviews and were not offered for their truth. *United States v. Woods*, 301 F.3d 556, 561 (7th Cir. 2002) (informant's side of recorded conversation with defendant provided context for the recorded conversation and was not hearsay). The defendants argue instead that the interrogators' questions were at times inflammatory and so laden with information from other sources in the investigation as to be unfairly prejudicial under Rule 403. This prejudice, they assert, was compounded by the district court's refusal to admit evidence of the acquittals.

Having viewed the videotapes in their entirety, we find no abuse of discretion. The jury saw what was actually the third interview with Sawdon, recorded two days after Moreland's death. In this interview, which Sawdon himself requested, Sawdon and the investigating officer, Sgt. Richmond, discuss Sawdon's admission that two days earlier he had prepared a misleading report about Moreland's death. Sawdon appears concerned about the repercussions of his false report, and Richmond tries to get him to come clean with the details of the night Moreland died. But apart from the false report, Sawdon does not actually admit to any wrongdoing. He blames Dieter for being too rough with Moreland but is not sure whether Dieter truly injured him. Much of the interview focuses on Sawdon's state of mind, as he is extremely depressed about what might happen to him. Richmond appears impatient but is generally friendly in the interview (or was trying to appear so); he thanks Sawdon for coming clean about the false report and expresses concern for Sawdon's emotional well-being. When Richmond leaves the room, Sawdon breaks down crying.

Two videotaped interviews with Dieter were admitted, and they are markedly different than Sawdon's. After listening at length to Dieter's account of the night in question, Richmond accuses him of lying, pointing out that Dieter's story is contradicted by the accounts of numerous witnesses. At one point Richmond, visibly upset, abruptly leaves the room and is replaced by another investigator, evidently a friend of Dieter's family, who adopts a conciliatory tone but expresses suspicion that Dieter is not being truthful. Dieter's account of what he did to Moreland changes as the interviews progress. For example, at first he says that he "turned Moreland over" as Moreland lay on the floor, but after questioning admits to dropping a handcuffed Moreland to the ground from a height of roughly three feet and then falling on top of him with his full weight. The tone of the interviews is confrontational, and Dieter is evasive or defensive throughout. When Dieter is left alone in the interview room, he sits impassively, showing no emotion.

The videotapes were surely prejudicial, especially to Dieter, but only *unfairly* prejudicial evidence is subject to exclusion. *Kelsay v. Consolidated Rail Corp.*, 749 F.2d 437, 443 (7th Cir. 1984). Evidence is unfairly prejudicial under Rule 403 "if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." *United States v. Vretta*, 790 F.2d 651, 655 (7th Cir.), *cert. denied*, 479 U.S. 851, 107 S. Ct. 179, 93 L. Ed. 2d 115 (1986). In weighing the probative value of the challenged evidence against the danger of unfair prejudice under Rule 403, the district court is engaged in "a comparison of intangibles" and is thus "afforded a special degree of deference: 'only in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge.'" *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir.), *cert. denied*, 502 U.S. 810, 112 S.

Ct. 54, 116 L. Ed. 2d 31 (1991) (quoting *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989)).

The danger of unfair prejudice was not so extreme here that the district court's decision to admit the videotaped interviews is called into question. As a record of the defendants' respective versions of the events leading up to Moreland's death, the tapes are highly probative of their actions, state of mind, and credibility. The interviews are not so dramatic, confusing, or misleading as to induce the jury to disregard the other evidence or to decide the case on an improper basis. The district court indicated its willingness to give the defendants substantial leeway to introduce evidence concerning Richmond's interrogation techniques in order to ameliorate any prejudicial effect of those techniques, but the defendants passed up the opportunity.

We also reject the defendants' argument that the admission of the videotaped interviews was unfairly prejudicial because the jury knew they were connected to a criminal investigation but was not allowed to hear evidence that the defendants had been acquitted of the criminal charges brought against them. Evidence of acquittal in a criminal action is generally irrelevant and inadmissible in a civil case involving the same incident "since it constitutes a 'negative sort of conclusion lodged in a finding of failure of the prosecution to sustain the burden of proof beyond a reason-able doubt.'" *Borunda v. Richmond*, 885 F.2d 1384, 1387 (9th Cir. 1989). *See also Donald v. Rast*, 927 F.2d 379, 381 (8th Cir. 1991); *Royal Exchange Assurance v. Fraylon*, 228 F.2d 351, 354 (4th Cir. 1955). The district court did not abuse its discretion in excluding the acquittal evidence, and the videotaped interviews were not rendered unfairly prejudicial under Rule 403 because of the absence of this evidence.

Finally, the defendants appear to suggest that the district court's limiting instruction was inadequate, but this argument is not developed. The court instructed the jury as follows: "As you were informed at the outset of this trial, two defendants on trial here [Dieter and Sawdon] were the subject of criminal proceedings. Neither that fact nor the result of those proceedings have any relevance to this case." The defendants have identified no authority, in this circuit or elsewhere, casting doubt on the propriety of this kind of instruction, and we have been unable to find any ourselves.

B. Dr. Lustgarten's Expert Testimony

The defendants also challenge the district court's admission of a portion of the testimony of Dr. Gary Lustgarten, a board-certified neurologist and neurosurgeon who testified concerning the cause of Moreland's death. They argue that Lustgarten's opinion as to where Moreland received his fatal injury was not scientific in the sense required by Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

The parties dispute whether the defendants preserved this issue for appeal. The record reflects that the defendants challenged another expert's testimony on *Daubert* grounds before trial, and the district court expressed some dissatisfaction with the requirements of *Daubert* as a general matter. Then, during Lustgarten's testimony, when the plaintiffs' attorney asked whether the expert had an opinion as to where the injury that caused Moreland's death occurred, the defendants' lawyer objected in the following terms:

> MR. KUS: Objection; based on hearsay, Your Honor. He has to believe a certain set of witnesses and

> testimony--unless you're talking about where in the body, but I think he's talking about where it occurred in the location, so I'll make that objection.
>
> THE COURT: The objection is overruled.

It is hard to discern even the germ of a *Daubert* challenge in this objection. The defendants' *Daubert* challenge to the testimony of a *different* expert hardly suffices to preserve the argument against Lustgarten. Their failure to address a *Daubert* challenge to Lustgarten's testimony is not excused by the district court's expression of dissatisfaction with the requirements of *Daubert*. The issue was forfeited.

Plain error review of a forfeited evidentiary issue in a civil case is available only under extraordinary circumstances when the party seeking review can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied. *Stringel v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 415, 421 (7th Cir. 1996); *Prymer v. Ogden*, 29 F.3d 1208, 1214 (7th Cir. 1994). The defendants have not even attempted to meet this standard.

C. Punitive Damages

The jury awarded $15 million in punitive damages against Dieter and $12.5 million against Sawdon, in addition to assessing compensatory damages at $29 million. The defendants do not directly attack the punitive damages award--they do not argue, for example, that the evidence is insufficient to sustain an award of punitive damages under the "reckless or callous indifference" standard for punitive damages in § 1983 actions. *See Smith v. Wade*, 461 U.S. 30, 55, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). Rather, they

challenge the size of the awards as constitutionally excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

In *Gore* the Supreme Court "instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575). Review of a constitutional challenge to a punitive damages award is *de novo*, which operates to "ensure[] that an award of punitive damages is based upon an 'application of law rather than a decision maker's caprice.'" *Id.* (quoting *Cooper Industries*, 532 U.S. at 436; quoting *Gore*, 517 U.S. at 587).

The degree of reprehensibility is the most significant factor. *Campbell*, 538 U.S. at 419. The defendant's conduct is evaluated according to five variables: (1) whether the harm was physical or economic; (2) whether the conduct evinced an indifference to or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions; and (5) whether the harm was the result of malice, trickery, or deceit, or mere accident. *Id.* We presume that the "plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory

damages, is so reprehensible as to warrant imposition of further sanctions to achieve punishment or deterrence." *Id.*

The defendants' conduct in this case qualifies as truly reprehensible. Taking the facts in the light most favorable to the verdict, *Roy v. Austin Co.*, 194 F.3d 840, 842 (7th Cir. 1999), the defendants' conduct was malicious and cruel, evincing a clear intent to cause Moreland great pain and suffering. To throw a man's head against concrete when he is handcuffed and presents no threat is clearly excessive and malicious. To discharge a canister of pepper spray into the face of a fully restrained, incapacitated individual is vicious and unconscionable. Moreland was roughed up repeatedly before the defendants ultimately ceased abusing him. In the end, the defendants placed Moreland in the attorney's room, shackled and strapped into the restraint chair, leaving his medical needs unattended.

The defendants' assault on Moreland was sustained rather than momentary, and involved a series of wrongful acts, not just a single blow; and Moreland died from the injuries inflicted by the defendants. All this exacerbates the reprehensibility of their behavior. Although it was not possible to determine which of Moreland's head traumas caused the fatal hematoma, Moreland clearly received more than one injury at the defendants' hands. The evidence also shows that the prolonged nature of the assault compounded Moreland's suffering. That the defendants knew Moreland was suffering but continued to abuse him is obvious from nearly all the testimony presented at trial. The jury clearly disbelieved the defendants' versions--that they were merely reacting to Moreland's own violent attempts to avoid being restrained and showered.

Finally, the defendants lied to the nurse and filed false reports to conceal their wrongdoing. The evidence supports a conclusion that the defendants were utterly and callously indifferent to Moreland's rights, engaged in wanton physical violence, disregard of obvious medical needs, and subsequent deceit.

The ratio between the compensatory and punitive damages in this case does not test the limits of constitutionality, although we acknowledge that both the compensatory and punitive damages awards are very large. There is no set formula for determining when the line is crossed, although the Supreme Court in *Campbell* suggested that "single-digit multipliers are more likely to comport with due process." *Campbell*, 538 U.S. at 425. In a recent case, this court upheld a punitive damages award of more than 37 times the size of the underlying compensatory damages in a case involving only minor, albeit highly troublesome, physical injury (bedbug bites). *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676-78 (7th Cir. 2003).

The court emphasized in *Mathias* that "the judicial function is to police a range, not a point," and we cannot say that the punitive damages in this case are beyond the range of what is acceptable. The awards are roughly half the amount of the compensatory damages. The defendants have not identified a single appellate case questioning the constitutionality of a punitive damages award that is a fraction of the underlying compensatory damages award. Nor have we.

On the third *Gore* guidepost the defendants cite several excessive force cases decided by this and other courts, pointing out that the amount of the punitive damages in those cases was much smaller than the awards here. But the cases

cited by the defendants are either quite dated or factually distinguishable. *Cf. Bell v. Milwaukee*, 746 F.2d 1205, 1266-67 (7th Cir. 1984) (upholding punitive damages of $25,000, $150,000, and $350,000 for police officers' participation in conspiracy to conceal facts of a fatal shooting); *Freeman v. Franzen*, 695 F.2d 485, 490 (7th Cir. 1982) (upholding $1,000 award against correctional officer for twice hitting the face of a restrained prisoner); *Hagge v. Bauer*, 827 F.2d 101, 110 (7th Cir. 1987) (upholding $ 25,000 award to an arrestee whose leg was broken as a result of officer's kick); *Bogan v. Stroud*, 958 F.2d 180, 186 (7th Cir. 1992) (upholding awards of $5,000 and $1,000 against correctional officers who hit and stabbed an inmate during altercation provoked in part by inmate slashing officer's face); *Thomson v. Jones*, 619 F. Supp. 745, 755 (N.D. Ill. 1985) (upholding award of $10,000 against correctional officer for hitting a handcuffed prisoner and causing hearing loss, and award of $5,000 against officer for acquiescence in co-worker's use of force); *Brown v. Triche*, 660 F. Supp. 281, 287 (N.D. Ill. 1987) (upholding award of $15,000 against deputy sheriff for beating of inmate that caused momentary unconsciousness, continuing pain "for some time," and humiliation). In light of the degree of reprehensibility of the defendants' conduct and the nature of the injuries inflicted, we conclude that the punitive damages awards against Dieter and Sawdon are not unconstitutional.

D. Cross-appeal of summary judgment in favor of Sheriff Speybroeck

The plaintiffs cross-appeal the grant of summary judgment to Sheriff Speybroeck; they contend that they presented sufficient evidence to create a jury question as to Speybroeck's § 1983 liability. We review *de novo* the grant of summary judgment, construing the record and all reasonable inferences drawn from it in the light most

favorable to the non-moving party, in this case the plaintiffs. *Del Raso v. United States*, 244 F.3d 567 (7th Cir. 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a [[matter of law. F]]ED. R. CIV. P. 56(c); *Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 450 (7th Cir. 1998).

Because Moreland was a pretrial detainee in the jail at the time of his death in custody, the plaintiffs' claim falls within the Fourteenth Amendment; however, we have previously noted that in this context a Fourteenth Amendment claim is evaluated by the same legal standards as an Eighth Amendment claim. *Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002) (citing *Henderson v. Sheahan*, 196 F.3d 839, 844 n.2 (7th Cir. 1999)). The plaintiffs must demonstrate that the sheriff was deliberately indifferent to Moreland's safety, that is, that the sheriff "was aware of a substantial risk of serious injury [to Moreland] but nevertheless failed to take appropriate steps to protect him from a known danger." *Id.* This requires the plaintiffs to show that "deliberate action attributable to [the sheriff] directly caused the deprivation of [Morelend's] civil rights." *Id.* (quoting *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir. 2000)). Stated differently, the plaintiffs must demonstrate that the sheriff made a deliberate choice and that the injury was caused by the pol-icy chosen. *Id.* That a different or better policy might have been used "does not necessarily mean that the [Sheriff] was being deliberately indifferent." *Id.*

Unconstitutional policies for purposes of § 1983 liability fall into three categories: "(1) an express policy that, when enforced, causes a constitutional deprivation; (2) a wide-spread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled

as to constitute a 'custom or usage' with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policy making authority." *Butera*, 285 F.3d at 605 (citing *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1013 (7th Cir. 2000)). The plaintiffs' complaint alleged that unconstitutional policies of the sheriff were partly to blame for Moreland's death, but in response to the sheriff's motion for summary judgment that claim seems to have been dropped. The plaintiffs do not now argue that the sheriff instituted policies that were reasonably certain to result in Moreland's death; indeed, their expert testified that the jail policies in force at the time were adequate. Their claim is rather that the sheriff's deputies in the jail routinely violated the department's policies, and that the sheriff was deliberately indifferent to this widespread pat-tern of violations.

In their opening brief to this court, the plaintiffs failed to discuss the facts relevant to their claim against the sheriff, relying instead almost entirely on a series of string citations to affidavits and other documents in the record. We will not scour a record to locate evidence supporting a party's legal argument. *See Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 547 n.10 (7th Cir. 2002). Perfunctory or undeveloped arguments are waived. *Colburn v. Trustees of Ind. Univ.*, 973 F.2d 581, 593 (7th Cir. 1992); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986). In their reply brief the plaintiffs have tried to flesh out their argument with a more detailed discussion of the evidence. Even if the initial underdeveloped argument is not construed as a waiver, the evidence is insufficient to raise a jury question on the plaintiffs' claim against the sheriff.

The plaintiffs assert ongoing violations of jail policies in three areas: (1) use of the OC-10 spray; (2) a federal order requiring the sheriff to abate overcrowding in the jail; and (3)

provision of medical care to injured inmates. As to the first of these, the plaintiffs point to tabulations of reported incidents of OC-10 spray use in the jail during the years 1995 (128 incidents), 1996 (73 incidents), and 1997 (17 incidents). They argue that this evidence demonstrates that the sheriff was aware of a pattern of violations of jail policy on the use of OC-10. But the number of pepper spray incidents, without more, does not establish that pepper spray was being routinely misused or that the jail's OC-10 policy was being violated.

The plaintiffs also contend that a memo sent to jail personnel in 1997 regarding the filing of incident reports constitutes an admission that OC-10 reports were not being filed, in violation of department policy. This is quite a stretch. The memo specifies when officers must file incident reports as a general matter. The jail policy on pepper spray instructs personnel to file an incident report "when chemical agents are used," and the memo clarifies that officers must file incident reports (presumably including OC-10 incident reports) before they go off duty from the shift during which the incident occurred. This does not constitute an admission that jail personnel were not filing OC-10 reports at all or that pepper spray was being misused. Furthermore, the memo was from the jail warden, Major William Goss, not Sheriff Speybroeck. At any rate, we fail to see how the report-filing policy or practice was likely to lead to Moreland's death.

The plaintiffs also claim that there were six specific incidents of improper use of OC-10 at the jail, but the record evidence at the time of summary judgment points to only three. Incident reports indicate that inmate Daniel Grimm was sprayed after kicking the door of the drunk tank, then brought to the fourth floor for a shower, then placed in a restraint chair. While restrained, he spat on an officer and was charged with felony battery with bodily waste. Grimm sustained no

injuries requiring medical care. In another incident, inmate Robert Coaron freed his legs from the shackles of a restraint chair and started kicking officers and spitting in all directions. The officers warned him that he would be sprayed if he did not desist; when he continued to spit at them, Dieter sprayed him. Coaron sustained no injuries requiring medical attention. In a third incident, inmate Casimer Wawrzyniak was in the drunk tank making loud noises and kicking the door. Officers opened the door intending to remove him to another floor, Wawrzyniak rushed the door and one of the officers sprayed him. He, too, sustained no injuries requiring medical attention.

There is nothing in the summary judgment record to suggest that these incidents involved a violation of the jail's policy on OC-10 use in the jail.[2] Equally important, these incidents do not amount to "a widespread practice" that is "permanent and well settled" so as to constitute an unconstitutional custom or policy about which the sheriff was deliberately indifferent. In any event, to be liable, Sheriff Speybroeck must have known there was a substantial risk of serious harm to Moreland; the primary injury here is Moreland's death, not the pain he suffered when sprayed with OC-10.

The plaintiffs also argue that Sheriff Speybroeck's deliberate indifference to Moreland's safety is demonstrated by his knowing violation of a federal consent decree requiring him to attempt to keep the inmate population at the jail at or

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[2] The plaintiffs have requested that we supplement the record with Daniel Grimm's trial testimony. This testimony was not in the summary judgment record before the district court; therefore, we will not consider it. *Hildebrandt v. Illinois Dep't of Nat. Res.*, 347 F.3d 1014, 1024-25 (7th Cir. 2003).

below 300, or 350 on weekends. The jail housed 360 inmates on the day of Moreland's death, a Friday. The plaintiffs have not linked jail overcrowding to Moreland's death.

Finally, the plaintiffs argue that jail personnel were inadequately trained to recognize the signs of serious head injury and otherwise respond to a medical emergency. But they have not brought forward any evidence of inadequate training with respect to inmates' medical care. The plaintiffs' expert, Dr. George Kirkham, concluded that "there was a lack of training regarding the appropriate steps to be taken in a medical emergency," but he based this conclusion on the fact that Moreland himself was not treated adequately. There is no evidence that the policies, customs, or practices of the department were deficient. One cannot infer a custom or practice from a single incident.

The plaintiffs cite *Woodward v. Correctional Medical Services of Illinois*, 368 F.3d 917, 929 (7th Cir. 2004) for the proposition that a single violation of federal rights can trigger § 1983 under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) if the violation was a "highly predictable consequence" of the failure to act. But *Woodward* does not relieve the plaintiff from the requirement of showing that an unconstitutional policy, custom, or practice existed at the time the plaintiff's rights were violated; it says only that the plaintiff need not show that the policy, practice, or custom resulted in past deprivations of rights. *Woodward*, 368 F.3d at 929.

III. Conclusion

We conclude that the district court did not abuse its discretion under Rule 403 by admitting the videotaped interviews of the defendants and excluding evidence that the

defendants were acquitted of criminal charges; also, the court's limiting instruction regarding this evidence was not inappropriate in any way. The defendants' *Daubert* challenge to Dr. Lustgarten's testimony was forfeited. The punitive damages awards against Dieter and Sawdon are not unconstitutionally excessive. We also conclude that summary judgment dismissing the plaintiffs' claim against Sheriff Speybroeck was appropriate. We affirm the judgment against Dieter and Sawdon and the summary judgment infavor of Speybroeck.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:99cv0607

[Filed April 2, 2002]

ESTATE OF CHRISTOPHER A. MORELAND, by GARY R. MORELAND and LINDA TUTTLE, Co-Personal Representatives, GARY R. MORELAND, LINDA TUTTLE, in their official capacity, GARY R. MORELAND, LINDA TUTTLE, in their individual capacity, GARRETT MORELAND, Decedent's Brother, and EVIE MORELAND, Decedent's Sister, Plaintiffs	)
v.	)
PAUL MOFFA, ERICH DIETER, MICHAEL SAWDON, ST. JOSEPH COUNTY, INDIANA, a public entity, ST. JOSEPH COUNTY POLICE DEPARTMENT, OMEGA HEALTH GROUP INC. dba Memorial Home Care Inc.	)

("Memorial"), LARRY BROWN, R.N.,)
and CONNIE GACHUNJA, QMA,)
Defendants)
_____)

ORDER

This Court heard extensive argument in open court in this case on March 18, 2002, and engaged in extensive dialogue with counsel. As a follow up, the plaintiffs have filed an extensive motion on March 28, 2002, attaching a transcript of that proceeding, which was, at the time of the ruling, complained of keenly in this Court's memory. Also, the pleadings are attached and they are well known, as certainly the decision of the Supreme Court in *Canton v. Harris*, 489 U.S. 378 (1989).

It is not the intent of this Court to elongate the dialogue with counsel, and no personal or professional offense is intended. This case has been on file since October 21, 1999, and has been through pleadings and discovery stage and, at least as to the Office of the Sheriff, summary judgment stage. This Court is not disposed to modify the decision entered on March 20, 2002, and that decision stands without modification. Counsel for plaintiffs and the remaining defendants are expected to be ready to go forward with trial as now scheduled. Specifically, the plaintiffs' motion for clarification and reconsideration filed March 28, 2002, is now **DENIED. IT IS SO ORDERED.**

DATED: April 2, 2002

/s/_____
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:99cv0607

[Filed March 20, 2002]

ESTATE OF CHRISTOPHER A. MORELAND, Deceased, by GARY R. MORELAND and LINDA TUTTLE, Co-Personal Representatives, GARY R. MORELAND, LINDA TUTTLE, in their official capacity, GARY R. MORELAND, and LINDA TUTTLE, in their individual capacity, GARRETT MORELAND, Decedent's Brother, and EVIE MORELAND, Decedent's Sister, Plaintiffs	)
v.	)
JOSEPH E. SPEYBROECK, PAUL MOFFA, ERICH DIETER, MICHAEL SAWDON, OMEGA HEALTH GROUP INC. dba Memorial Home Care Inc.	)

("Memorial"), LARRY BROWN, R.N.,)
and CONNIE GACHUNJA, QMA,)
Defendants)
)

MEMORANDUM AND ORDER

This case was filed on October 21, 1999 in the South Bend division of this Court, purporting to assert claims under 42 U.S.C. § 1983, and to invoke this Court's federal question jurisdiction under 28 U.S.C. § 1331 and § 1343(3). A very significant and helpful proceeding was had with counsel present in South Bend, Indiana on the afternoon of March 18, 2002, and a very considerable clarification took place at that proceeding. As a result of that proceeding, and in spite of some references in the record, it was conceded and admitted that Joseph E. Speybroeck is a defendant in this case in his official capacity as the Sheriff of St. Joseph County, Indiana at the relevant time, and in his individual capacity. It was also conceded that the relevant state law claims which may be referred to in the original complaint are now the subject of a state court proceeding in St. Joseph County, Indiana, and are not claimed to be before this Court. What is now claimed to be before this Court are issues of liability and damages including punitive damages related to claims under § 1983.

Joseph E. Speybroeck, both in his official and individual capacities, has filed a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure (Fed.R.Civ.P.), and the principal focus of the proceeding on March 18, 2002 was that motion.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as

to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Bragg v. Navistar Int'l Trans. Corp.,* 164 F.3d 373 (7th Cir. 1998). *Celotex* addressed the initial burdens of the parties under Rule 56, and *Anderson* addressed the standards under which the record is to be analyzed within the structure of Rule 56.

The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. *Celotex,* 477 U.S. at 324 (quoting Fed.R.Civ.P. 56); *Larimer v. Dayton Hudson Corp.*, 137 F.3d 497 (7th Cir. 1998). A question of material fact is a question which will be outcome determinative of an issue in the case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. *Anderson,* 477 U.S. at 248. Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts shows that there is a genuine [material] issue for trial.'" *Id.* The nonmoving party cannot rest on its pleadings, *Weicherding v. Riegel,* 160 F.3d 1139 (7th Cir. 1998); *Waldridge v. American Hoechst Corp.,* 24 F.3d 918 (7th Cir. 1994); nor may that party rely upon conclusory allegations in affidavits. *Smith v. Shawnee Library Sys.,* 60 F.3d 317, 320 (7th Cir. 1995).

During its summary judgment analysis, the court must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560 (7th Cir. 1996). Furthermore, it is required to analyze summary judgment

motions under the standard of proof relevant to the case or issue. *Anderson,* 477 U.S. at 252-55. Applying the above standard, this Court addresses defendants' motion.

It needs to be emphasized here as it was in that proceeding that none of the other remaining defendants have joined in this motion for summary judgment. So the focus here must be and is the possible liability status of Joseph E. Speybroeck in this case.

The first question with regard to former Sheriff $peybroeck is whether he is entitled to immunity under the Eleventh Amendment of the Constitution of the United States as a state official. As a textual matter, it was necessary to examine Article 6, Section 2 of the Constitution of Indiana as it was amended most recently in 1984. A facial examination of that provision of the Constitution fails to establish the Office of Sheriff of the various counties of the State of Indiana as a state official for purposes of the Eleventh Amendment. Comparisons to the Offices of Prosecuting Attorney are not particularly helpful in this regard. Article 7 of the Constitution of Indiana is the judicial article and Section 16 of the judicial article creates the Office of the Prosecuting Attorney, which, along with the circuit judges are clearly state officials under the Indiana Constitution and for purposes of the Eleventh Amendment. Thus far in this analysis, one cannot justify the conclusion that the elected Sheriff in St. Joseph County, Indiana on October 25, 1997 was a state official. This Court has given close attention to *McMillian v. Monroe County, Alabama,* 520 U.S. 781 (1997), and has made a close comparison with the provisions in the State Constitution of Alabama, as well as in the aforesaid provisions of the Constitution of Indiana, and there are significant differences. Thus, *McMillian* is not authority

here to hold that the Sheriff of St. Joseph County, Indiana in 1997 was a state official.

Recent decisions by the Court of Appeals of the Seventh Circuit dealing with the Sheriff in Illinois is worth at least a passing reference. Two cases from that circuit address part of the problem. *See DeGenova v. Sheriff of DuPage County,* 209 F.3d 973 (7th Cir. 2000), and *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998). Obviously, both of these cases represent a judicial spin on *McMillian.* Neither would justify a finding here that the Sheriff of St. Joseph County, Indiana in 1997 was a state official for purposes of the Eleventh Amendment. Thus, any decision here with referenee to the status of Mr. Speybroeck in this case cannot be bottomed on Eleventh Amendment immunity.

In the briefs and in oral argument, some effort was spent by Speybroeck to find a way to tag him under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). That concept is not available here as a basis of dismissing Speybroeck from this case, and is not here invoked.

These two preliminary decisions leave two more difficult ones. One under *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), and as to Speybroeck, the issue of deliberate indifference under *Farmer v. Brennan,* 511 U.S. 825 (1994), *Wilson v. Seiter,* 501 U.S. 294 (1991), and *Estelle v. Gamble,* 429 U.S. 97 (1976). Joseph E. Speybroeck was not a personal participant in any of the relevant events that involved Christopher A. Moreland on or about October 25, 1997 at the St. Joseph County Jail in South Bend, Indiana. Both before and since the Supreme Court's decision in 1978 in *Monell,* it is clear that the concept of respondeat superior is not available in the context of this case. *See,* for example, the earlier case *of Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971), and a

plethora of later cases, including *Rascon v. Hardiman,* 803 F.2d 269 (7th Cir. 1986).

Remembering that Speybroeck is the only defendant prosecuting a motion for summary judgment here, and remembering that he was not personally present or personally involved in any of the incidents involving this decedent, one has to stretch the concept of deliberate indifference a great deal to hold him here under it. *See McGill v. Duckworth,* 944 F.2d 344 (7th Cir. 1991), *cert. denied,* 503 U.S. 907 (1992). *See also DelRaine v. Williford,* 32 F.3d 1024 (7th Cir. 1994). Much more factually pointed are *Boucher v. Brown County,* 272 F.3d 484 (7th Cir. 2001), and especially the opinion of Judge Posner in *Proffitt v. Ridgeway,* 279 F.3d 503 (7th Cir. 2002). The concurring opinion of Judge Ripple at 279 F.3d 508 is not at odds with the reasoning here. *Egebergh v. Nicholson,* 272 F.3d 925 (7th Cir. 2001) is not a basis to keep Speybroeck in this case, but itmay have relevance in the trial of the claims as to the other defendants.

It has been clearly established under § 1983 that negligence will not suffice as a basis for liability in the context of this case. *See Davidson v. Cannon,* 474 U.S. 344 (1986), and *Daniels v. Williams,* 474 U.S. 327 (1986). In the absence of direct personal participation, there is another legal peg here invoked and that is the failure to train under *Canton v. Harris,* 489 U.S. 378 (1989). It needs to be remembered that the standard under *Canton* is also deliberate indifference. *See also Pacelli v. DeVito,* 972 F.2d 871 (7th Cir. 1992), *Salazar v. Chicago,* 940 F.2d 233 (7th Cir. 1991), *Holmes v. Sheahan,* 930 F.2d 1196 (7th Cir. 1991), *cert. denied,* 502 U.S. 960 (1992), *Maul v. Constan,* 928 F.2d 784 (7th Cir. 1991), *and Graham v. Sauk Prairie Police Comm.,* 915 F.2d 1085 (7th Cir. 1990). The proof against Speybroeck fails these tests.

Try as they will, the plaintiffs in this case simply cannot make a jury issue with reference to the deliberate indifference of Speybroeck in this case, and while the Eleventh Amendment is not a basis for his being released, the lack of an appropriate deliberate indifferent issue is. This is true even if the case could survive scrutiny under *Monell,* which this Court believes that it cannot. So, at the end of the day, the case will proceed, if at all, against the remaining deputy sheriffs and health care providers.

In accord with the discussions held in open court on March 18, 2002, it is important for the remaining parties and their counsel to understand the general and particular way in which the trial of this case before a jury of eight persons will be conducted. Since there are no state law issues, the case will proceed as a trial on the basis of deliberate indifference against the remaining defendants sans Speybroeck. The only issue that will be presented to the jury in the first stage of that trial will be that of liability under Section 1983 as to the remaining defendants. That issue will be tried, argued and instructed upon and hopefully decided by the jury. In the event that the plaintiffs prevail at that stage of the trial, the second stage will involve the determination of damages after evidence on that subject and appropriate instructions and argument. It will be submitted to the same jury.

It is most respectfully requested that in addition to what must be now intensive trial preparation, that lead counsel for both the plaintiffs and remaining defendants should again confer in depth with regard to the possible settlement of this case, and the services of an experienced and able magistrate judge will be available.

IT IS SO ORDERED.

DATED: March 20, 2002

/s/_____
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT